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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 SECURITIES AND EXCHANGE  
COMMISSION,

12 Plaintiff,

13 vs.

14 KENT H. ROBERTS,

15 Defendant.

) Case No. C-07-4580 MHP  
)

) **NON-PARTY HOWREY LLP'S**  
) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN OPPOSITION TO**  
) **DEFENDANT KENT H. ROBERTS'**  
) **REQUEST FOR PRODUCTION OF**  
) **ATTORNEY NOTES**

) Hearing Date: February 25, 2008

) Time: 2:00 p.m.

) Courtroom: 15

) Judge: Hon. Marilyn H. Patel

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1 **I. INTRODUCTION**

2 Defendant Kent H. Roberts ("Roberts") seeks to compel non-party Howrey LLP ("Howrey"),  
 3 outside counsel to the Special Committee of the Board of Directors of McAfee, Inc. ("McAfee" or "the  
 4 Company"), to produce its notes of interviews of current and former employees, officers and directors  
 5 of McAfee taken in the course of an independent investigation of potential stock option backdating at  
 6 the Company during the ten-year period from 1995 through 2006. Those notes do not contain a  
 7 verbatim recitation of questions asked and answers given but rather consist of attorneys' impressions,  
 8 conclusions, and opinions relating to the substance of each interview. In short, the notes are classic  
 9 attorney-client privileged communications or attorney opinion work product, or both.

10 Although the Special Committee has cooperated fully with the Securities and Exchange  
 11 Commission ("SEC") and the Department of Justice ("DOJ") at every stage of the investigation, the  
 12 interview notes have never been shared with or provided to the government, McAfee's independent  
 13 auditors, or plaintiffs' counsel in civil actions against McAfee. Instead, the Special Committee and its  
 14 advisors provided to McAfee's Board of Directors ("Board"), and ultimately to the SEC, DOJ and the  
 15 outside auditors, a detailed PowerPoint presentation containing a compilation of non-privileged source  
 16 documents and emails concerning a number of problematic options grants. That PowerPoint and all of  
 17 the source documents have been produced in full to Roberts. As discussed in Sections IV.A–C below,  
 18 no waiver of the attorney-client privilege or work product doctrine has occurred, and the cases relied  
 19 upon by Roberts are plainly distinguishable. In this civil case, unlike in *United States v. Reyes*, 239  
 20 F.R.D. 591 (N.D. Cal. 2006), Roberts has at his disposal all of the discovery tools to obtain the  
 21 underlying factual information and evidence he desires for his defense. Roberts has not made the  
 22 requisite showing of necessity to compel production of opinion work product. For all these reasons,  
 23 Roberts' request for production of the interview notes should be denied.

24 Roberts also has demanded production of certain other attorney work product from Howrey,  
 25 specifically, notes taken by Howrey attorneys during meetings with the Board or during meetings or  
 26 telephone conversations with the government. The notes taken by Howrey attorneys during meetings  
 27 with the Board are plainly protected by the Board's attorney-client privilege, and that privilege has not  
 28

1 been waived. Thus, as explained more fully in Section IV.E below, the Court should not require those  
 2 notes to be produced. As for notes taken by Howrey attorneys during meetings with the SEC and DOJ,  
 3 Howrey has offered to produce those notes, subject only to redaction necessary to protect the mental  
 4 impressions of the attorneys or other work product. As noted in Section IV.F below, production in that  
 5 form is the correct result.

## 6 **II. ISSUES PRESENTED**

7 1. Whether Defendant Roberts is entitled to production of Howrey's privileged  
 8 investigative interview notes when those notes have never been provided to third parties and there has  
 9 been no waiver of the attorney-client privilege or attorney work product protection.

10 2. Whether Defendant Roberts is entitled to production of opinion work product contained  
 11 in Howrey's privileged investigative interview notes when he has access to all of the discovery tools  
 12 provided by the Federal Rules of Civil Procedure, as well as a list of witnesses and available contact  
 13 information readily available to him.

14 3. Whether Defendant Roberts is entitled to production of Howrey's notes taken during  
 15 meetings with McAfee's Board of Directors when such notes reflect attorney-client privileged  
 16 communications, and the privilege has not been waived.

17 4. Whether Defendant Roberts is entitled to all portions of Howrey's notes taken during  
 18 meetings with the government when such notes contain attorney work product that has not been  
 19 waived and must be redacted prior to any production.

## 20 **III. STATEMENT OF FACTS**

### 21 **A. Kent Roberts' Admitted Backdating and Termination.**

22 From January 2001 to May 2006, Defendant Roberts, a member of the Texas state bar, was  
 23 general counsel of McAfee. *See* Compl., ¶ 7. In May 2006, an independent research organization  
 24 identified McAfee as one of several companies that had a statistical risk for having backdated options  
 25 grants during the period from 1997 through 2002. *See* Declaration of Robert E. Gooding, Jr. dated  
 26 February 15, 2008 ("Gooding Decl."), ¶ 2. Thereafter, McAfee's management began an informal  
 27 internal review of certain historical stock option grants. Management quickly identified anomalies in  
 28

1 certain historical stock option grants, including a February 14, 2000 grant of 20,000 options to Roberts.  
 2 Roberts, who had become aware of the internal review, ultimately admitted to the CEO, two outside  
 3 directors, and an outside lawyer for the Company that he, along with the Company's former Controller,  
 4 had secretly accessed McAfee's internal electronic system for tracking employee stock options and  
 5 changed the option grant date for his own February 14, 2000 grant to April 14, 2000. *See* Compl., ¶  
 6 17. Roberts' manipulation had the effect of lowering his exercise price by almost \$10, from \$29.63 per  
 7 share to \$19.75 per share, thus instantly rendering his options back "in the money." *See id.* ¶¶ 13-15 &  
 8 17. The Board acted quickly on this information and, on May 29, 2006, terminated Roberts'  
 9 employment for cause.

#### 10 **B. The Independent Investigation.**

11 The Board contemporaneously decided that McAfee should undertake an independent  
 12 investigation to evaluate the conduct of McAfee officers, employees and directors involved in the  
 13 options granting process and whether the Company's accounting for stock options grants between  
 14 January 1, 1995 and March 31, 2006 was proper.<sup>1</sup> *See* Gooding Decl., ¶ 2. The Board directed that the  
 15 investigation be conducted by a Special Committee comprised of Board members who had not  
 16 previously served on the Compensation Committee or otherwise been involved in the options granting  
 17 process. The Special Committee was charged with determining whether any improper conduct had  
 18 occurred and whether any remedial measures, including restatement of historical financial statements,  
 19 were necessary.

20 To assist it, and to ensure independence, the Special Committee retained an experienced law  
 21 firm, Howrey, which had not previously represented the Company or any of its current or former  
 22 management. A team of Howrey attorneys, together with FTI Consulting, Inc. ("FTI"), a forensic  
 23 accounting and electronic evidence collection specialist hired by Howrey, coordinated the investigative  
 24 efforts. *See id.* ¶ 3.

25  
 26  
 27 <sup>1</sup> Around the same time, the SEC and DOJ commenced investigations of potential stock option  
 28 backdating at McAfee. McAfee shareholders also commenced derivative actions.



1 In the course of the investigation, Howrey gathered and reviewed over one million pages of  
2 hard-copy documents and more than 3.3 million email communications and electronic documents.  
3 Howrey compiled relevant documents regarding every significant stock option grant between 1995 and  
4 2006, as well as the Company's accounting for those grants. Those materials were ultimately collected  
5 in a large number of individual binders organized by option grant and individual (hereinafter, "Source  
6 Binders"). *See id.*

7 In addition, Howrey and FTI interviewed 84 current and former McAfee employees, directors,  
8 officers and other individuals regarding the Company's stock option granting practices and procedures,  
9 as well as particular stock option grants. *See id.* ¶ 4. No representatives of the Company's  
10 management or McAfee's outside counsel participated in any of the interviews. Given the broad scope  
11 of the investigation, a substantial number of the interviewees provided information that had nothing to  
12 do with Roberts, his stock option grants, his role in the stock option granting process, or the other  
13 grants identified in the Complaint.

14 During most of the interviews, Howrey and/or FTI personnel took handwritten notes. *See id.* ¶  
15 5. Those interview notes did not contain a verbatim recitation of questions asked and answers given  
16 but rather contained the attorneys' impressions, conclusions, and opinions about the substance of the  
17 interviews. In a few instances, memoranda were prepared from the handwritten notes. The interview  
18 notes and memoranda have never been provided to the Board, the Company's outside auditors, the  
19 SEC, DOJ, plaintiffs' counsel in civil actions or anyone else outside Howrey. *See id.*

#### 20 **C. The Special Committee's Presentation to the Board.**

21 At the conclusion of the investigation, the Special Committee, in conjunction with Howrey,  
22 prepared a detailed PowerPoint presentation for the Board. *See id.* ¶ 6. The PowerPoint described the  
23 scope and methodology of the investigation and included some of the key documents and emails  
24 compiled in the Source Binders. Certain documents and emails were excerpted or highlighted. The  
25 PowerPoint did not contain findings, conclusions, opinions or legal theories of Howrey or any excerpts  
26 or summaries from the interview notes. Instead, it set forth the underlying *facts* with respect to a  
27 number of problematic transactions in which it appeared that misdating or backdating of stock options  
28

1 grants may have occurred, with the expectation that the Board would reach its own conclusions and  
2 take whatever corrective personnel actions or other remedial actions it deemed necessary.

3 On October 10, 2006, the Special Committee presented the PowerPoint to the Board. *See id.* ¶  
4 7. No member of Company management or any third parties were present during the meeting, other  
5 than McAfee's regular outside corporate counsel. After presentation of the initial slides relating to the  
6 scope and methodology of the investigation, the Company's former CEO, George Samenuk, was  
7 excused from the meeting and did not return. At the request of the Special Committee, certain  
8 individual directors were excused from the meeting during the Special Committee's discussion of  
9 grants relating to those directors. During the meeting, Howrey answered all of the Board's questions,  
10 including questions about what certain witnesses said in the course of their interviews. In doing so,  
11 Howrey attorneys did not review the interview notes prior to the meeting, take those notes to the  
12 meeting, or refer to the notes in answering questions at the meeting. In contrast, all of the Source  
13 Binders were physically available for inspection during the meeting. *See id.*

14 **D. Presentations of the PowerPoint to Third Parties.**

15 Howrey ultimately presented a virtually identical PowerPoint in a meeting with members of the  
16 enforcement staff of the SEC on November 2, 2006.<sup>2</sup> *See id.* ¶ 8. Attendees at that meeting were  
17 Howrey, FTI, the SEC, and two members of the Special Committee. On November 8, 2006, Howrey  
18 presented the same PowerPoint in a meeting with DOJ personnel. During these meetings, Howrey  
19 responded to questions from the government as to what certain individuals had said about particular  
20 issues during the course of their interviews. However, Howrey did not provide its interview notes,  
21 take them to the meetings or review them prior to the meetings. Indeed, the Special Committee  
22 declined a specific request from the SEC to produce its interview notes and summaries. *See id.*

23 At the conclusion of the internal investigation, and in anticipation of the Company's  
24 restatement of historical financial statements, the Special Committee and its advisors also met with the  
25

26 <sup>2</sup> Roberts is in possession of the entirety of the PowerPoint presentation to the SEC. *See id.* ¶ 9. In  
27 addition, Howrey has provided Roberts with a list of the few minor differences between that  
28 PowerPoint and the one presented to the Board of Directors on October 10, 2006.



1 Company's outside auditors, presented the PowerPoint to them, and responded to questions about what  
 2 certain witnesses had said in the course of their interviews. *See id.* ¶ 10. However, Howrey did not  
 3 provide access to its interview notes or summaries to the auditors, despite a request to do so.

4 In November 2007, at the direction of the Special Committee, Howrey met with counsel for  
 5 plaintiffs in the derivative actions in connection with settlement discussions. In the course of that  
 6 meeting, Howrey described the scope and methodology of the investigation and shared a few non-  
 7 privileged documents from the Source Binders. *See id.* ¶ 11. Howrey did not present the PowerPoint  
 8 or refer to its interview notes during the meeting.<sup>3</sup>

#### 9 **E. Other Communications With the SEC and DOJ.**

10 Over the course of Howrey's engagement with the Special Committee, Howrey spoke by  
 11 telephone with personnel from the SEC and DOJ on numerous occasions. *See id.* ¶ 12. Although one  
 12 of the attorneys on the investigative team reviewed some of the interview notes in advance of some of  
 13 the calls with the government, and Howrey responded to all of the government's questions, Howrey  
 14 never provided its interview notes to the government. Howrey did not have or refer to the interview  
 15 notes during the calls with the government. *See id.*

16 Howrey attorneys also took notes during some meetings and telephone conversations with the  
 17 government. Those notes reflect the substance of communications with the government, but also  
 18 contain the attorneys' mental impressions, conclusions and opinions. Howrey has never shared or  
 19 provided these notes with any third party. *See id.*

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20  
 21  
 22  
 23 <sup>3</sup> At the direction of the Special Committee, Howrey declined to produce its interview notes in  
 24 response to discovery requests from Kevin Weiss, McAfee's former president, who was terminated for  
 25 cause in the course of the internal investigation. An arbitrator presiding over the claims brought by  
 26 Weiss against the Company initially denied Weiss's motion to compel production but ordered Howrey  
 27 to provide the facts through testimony relating to Mr. Weiss's options and conduct that had been  
 28 discovered in the course of the investigation. Thereafter, the arbitrator denied Weiss's renewed motion  
 to compel production of Howrey's interview notes. *Accord Shields v Sturm, Ruger & Co.*, 864 F.2d  
 379, 382 (5th Cir. 1989) (compelled disclosure of protected material in one case does not prevent a  
 party from claiming work product protection before another court).

**F. Howrey's Production in Response to Defendant Roberts' Subpoena.**

On or about November 2, 2007, Defendant Roberts subpoenaed Howrey for various categories of documents, including the interview notes and summaries and notes from meetings with the government and the Board. Howrey produced 872 pages of non-privileged documents in response, including:

- letters detailing the scope and methodology used by Howrey in its investigation, including a list of the current and former employees, directors and officers interviewed, as well as all available contact information;
- written summaries of recommended accounting treatment for certain stock option grants reviewed during the course of the investigation;
- pages 1-33 of the November 2, 2006 PowerPoint presentation (discussing investigation scope and methodology) that Roberts had not previously received from other sources; and,
- written communications between Howrey and the enforcement staff at the SEC and/or DOJ.

In addition, Roberts had previously received in response to his subpoena to McAfee more than 30,000 pages of materials collected during Howrey's investigation, including all of the contents of the Source Binders.

**G. Ongoing Discovery by Defendant Roberts.**

In his Rule 26(a) initial disclosures in this litigation, Defendant Roberts has identified 41 individuals whom he wishes to depose, including many of the individuals interviewed by the Special Committee. Eleven witnesses will have testified as of the filing date of this Memorandum, including directors Robert Pangia, Denis O'Leary, and Robert Bucknam, current and former executives or employees George Samenuk, Eric Brown, Stephen Richards, David Roche, Kandis Thompson, Eric Wong and Jennefer Koopman, and outside stock administration consultant Marianne Snook. Roberts is attempting to schedule at least seven more depositions, including former director Robert Dutkowsky, former audit partner Larry DeBower, former McAfee president Art Matin, and current and former employees Sylvia Garcia-Lechelt, Angela Bullock, Charles Deaton and Lillian Meggs.

1 **IV. ARGUMENT**

2 **A. There Has Been No Waiver of the Attorney-Client Or Work Product Privileges.**

3 Although the Special Committee and Howrey cooperated fully with the government and shared  
4 the facts discovered in the course of the investigation, they did so without waiver of the attorney-client  
5 and/or attorney work product privileges. Howrey did not provide its interview notes and summaries to  
6 any third party. The Special Committee specifically declined to provide access to the interview notes  
7 to the SEC and the outside auditors, despite direct requests to do so.

8 The only information provided by Howrey to third parties has been the PowerPoint  
9 presentation and the Source Binders, which contain *facts* — not attorney-client privileged  
10 communications or attorney work product. The PowerPoint is entirely made up of slides describing  
11 the scope and methodology of the investigation and certain non-privileged documents and emails from  
12 the Source Binders relevant to certain problematic transactions. The fact that Howrey responded to  
13 questions from third parties about some of the interviews does not constitute waiver because its  
14 responses were limited to specific *facts*, not verbatim recitations of questions asked and answers given  
15 or the attorneys' mental impressions, conclusions or opinions.

16 **B. *United States v. Reyes* Does Not Support an Order Compelling Production of**  
17 **Attorney Interview Notes.**

18 In his letter brief dated January 28, 2008, and in the telephonic hearing with the Court on  
19 January 30, Roberts relied heavily on Judge Breyer's recent decision in *United States v. Reyes*, 239  
20 F.R.D. 591 (N.D. Cal. 2006). Roberts' reliance on that case is misplaced.

21 *First*, as the Court observed during the telephonic hearing, *Reyes* is a criminal case in which the  
22 preservation of the attorney-client and work product privileges was balanced against the strong Sixth  
23 Amendment right to effective assistance of counsel and confrontation of witnesses. In contrast, this is  
24 a civil case in which the fundamental rights of a criminal defendant are not implicated.<sup>4</sup>

25 \_\_\_\_\_  
26 <sup>4</sup> Indeed, because Roberts' criminal trial is scheduled for April 15, 2008, while civil discovery in this  
27 case is ongoing, Roberts is effectively obtaining discovery in his criminal case far beyond what the  
28 Federal Rules of Criminal Procedure provide for most defendants.

1        *Second*, the subpoena to the outside law firms in the *Reyes* case was issued pursuant to Federal  
2 Rule of Criminal Procedure 17(c). Because it was a criminal case, the defendant in *Reyes* had no  
3 opportunity to conduct *any* pretrial discovery of fact witnesses. Here, in contrast, Roberts has the full  
4 panoply of civil discovery tools available to him. Through his discovery requests, Roberts now has  
5 possession of virtually *all* of the relevant documents and emails discovered during the course of the  
6 investigation relating to the claims against him. In particular, Roberts has discovered the entire list of  
7 witnesses interviewed by Howrey, along with all available contact information. In stark contrast with  
8 the defendant in *Reyes*, Roberts has deposed, or will depose, many of those witnesses. He is also free  
9 to interview or otherwise contact any of the other witnesses prior to trial. There is no suggestion that  
10 any of the individuals who were interviewed by Howrey have, or will, assert their Fifth Amendment  
11 rights. Thus, Roberts cannot claim, as the defendant in *Reyes* did, that the interview notes are the only  
12 available source of the information he seeks or that production of those privileged notes is in any way  
13 necessary.

14        *Third*, the attorney interview notes at issue in *Reyes* had unquestionably been shared with third  
15 parties. The law firms in that case had disclosed the contents of their investigative interview  
16 memoranda to the SEC. *See id.* at 596. Here, in contrast, Howrey has not provided its interview notes  
17 to *any* third parties, much less the privileged communications, mental impressions, conclusions,  
18 opinions and legal theories contained therein.

19        *Finally*, the relief ultimately granted in *Reyes* was much narrower than the extraordinary relief  
20 sought by Roberts here. In *Reyes*, the court only ordered production of the interview notes for *in*  
21 *camera* inspection. *See* 239 F.R.D. at \*21-22. The court deferred ordering production of any portion  
22 of the interview notes to the defendant until after the witnesses testified on direct examination *and* the  
23 court determined that the interview notes contained relevant impeachment material. Thus, the court  
24 did not order wholesale production of the privileged notes to the defendant in *Reyes* prior to trial.  
25 Consequently, *Reyes* does not support the broad relief that Roberts seeks in this case.

**C. *Ryan v. Gifford* Similarly Does Not Provide a Basis for Production Here.**

In his January 28, 2006 letter brief, Roberts also relied heavily on the recent Delaware decision in *Ryan v. Gifford*, No. 2213-CC, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007). That case arose in the context of shareholder derivative litigation against corporate defendants accused of backdating stock options. Plaintiffs sought a written report made by a special committee to the full board of directors. The *Ryan* court ordered the report produced on the grounds that the special committee's presentation to the board constituted a waiver of privilege. However, the court made clear that its decision was based on a number of specific facts *not* present here. Specifically,

- Attorneys for individual directors named as defendants in the derivative action were present at the board meeting at which the special committee's report was presented; and,
- During summary judgment proceedings in the derivative action, certain director-defendants had relied heavily upon privileged information contained in the Special Committee's report in an effort to exonerate themselves from liability, while at the same time attempting to withhold the report from plaintiffs' counsel.

See 2008 WL 43699 (Del. Ch. Jan. 2, 2008), at \*2-3 (denying application for order certifying an interlocutory appeal). The facts of this case could not be more different.

*First*, at the October 10, 2006 presentation to the Board, only the Special Committee, Howrey and independent directors of the Board were in attendance at all crucial times. The Board excused certain directors from the meeting during discussion of grants relating to those directors, and the CEO was excused for virtually all of the meeting. No counsel for any third parties was present. During the meeting, Howrey answered all of the Board's questions, including questions about some of the statements that some witnesses made during the interviews. However, to respond to the Board's inquiries, Howrey attorneys did not review the interview notes prior to the meeting, take those notes to the meeting, or refer to the notes in answering questions at the meeting. Rather, the Board had available to it the PowerPoint as well as all of the Source Binders, to which it could refer during the meeting.

*Second*, to the extent that any director present during the October 10 Board meeting was also a defendant in the derivative litigation, no director has used the PowerPoint or any interview notes in defense of those claims or to assert non-liability.



1        *Third*, unlike in *Ryan*, the availability of the Special Committee's "report" is not an issue here.  
 2 The PowerPoint presented to the Board and the government has already been produced to Roberts. As  
 3 for attorneys' interview notes, the *Ryan* court declined to order their wholesale production because  
 4 they clearly constituted protected attorney work product. Accordingly, the court only ordered *in*  
 5 *camera* inspection of the notes. *See Ryan*, 2007 WL 4259557, at \*4.

6        These key factual differences between *Ryan* and this case mandate denial of Roberts' request  
 7 for production of the interview notes. Indeed, the facts are identical to the scenario that the *Ryan* court  
 8 observed would *not* require production of privileged attorney notes:

9                The decision [to order production] would *not* apply to a situation (unlike  
 10                that presented in this case) in which board members are found to be  
 11                acting in their fiduciary capacity, where their personal lawyers are not  
 12                present, and where the board members do not use the privileged  
 13                information to exculpate themselves. . . .

14        2008 WL 43699, at \*5 (emphasis added). For all these reasons, *Ryan* provides a clear basis for  
 15 denying Roberts' request for Howrey's interview notes.<sup>5</sup>

#### 16        **D.        Roberts Has Failed to Demonstrate Substantial Need and Undue Hardship.**

17        Even if the Court were to find that a waiver of the attorney-client privilege has somehow  
 18 occurred, Roberts still has failed to meet the stringent requirements necessary to overcome the  
 19 protection afforded by the attorney work product doctrine. To obtain discovery of non-opinion work  
 20 product, the party seeking discovery must, under Rule 26(b)(3), establish that it "has substantial need .  
 21 . . and . . . is unable without undue hardship to obtain the substantial equivalent of the materials by  
 22 other means." Opinion work product, on the other hand, "receives nearly absolute protection." *See*  
 23 *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 507 (S.D. Cal. 2003). Thus, discovery of an attorney's  
 24 mental impressions, conclusions, opinions and legal theories is permitted *only* where the information is

25        <sup>5</sup> During the January 30, 2008 telephonic discovery hearing, this Court mentioned that its opinion in *In*  
 26 *Re Napster, Inc. Copyright Litigation*, 2006 U.S. Dist. LEXIS 33036 (Apr. 21, 2006) might have some  
 27 bearing on the issue of waiver in this dispute. Having reviewed that opinion, however, the issue in  
 28 *Napster* was whether the crime-fraud exception vitiated the attorney-client privilege, an entirely  
 different issue than at stake here. Howrey is unaware of another opinion from the *Napster* copyright  
 litigation that is relevant to the attorney-client privilege, attorney work product and waiver issues  
 involved in this discovery dispute.



1 “directly at issue and the need for production . . . compelling.”<sup>6</sup> See *Handgards, Inc. v. Johnson &*  
 2 *Johnson*, 413 F. Supp. 926, 933 (N.D. Cal. 1976); *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976  
 3 F.2d 573, 577 (9<sup>th</sup> Cir. 1992).

4 Roberts cannot come close to meeting this high standard. As noted above, Roberts is already in  
 5 possession of all of the documents containing the underlying facts concerning the grants at issue and  
 6 the particular conduct of which he is accused. He has a list of all of the witnesses interviewed by  
 7 Howrey, along with all available contact information. Armed with that information, Roberts has been  
 8 conducting extensive depositions in this case and is free to interview or depose any of those witnesses  
 9 about the underlying options grants and McAfee’s accounting in order to obtain relevant and  
 10 admissible evidence.<sup>7</sup> Roberts has made no showing that any of the witnesses is physically  
 11 unavailable, and none have asserted or are expected to assert their Fifth Amendment rights.

12 Moreover, Roberts cannot come close to a showing of the “compelling need” that he must  
 13 demonstrate to obtain production of the *opinion* work product contained in the interview notes.  
 14 Howrey’s mental impressions, conclusions, opinions and/or legal theories are far from being “directly  
 15 at issue” in this litigation. They are *not at issue at all* because Roberts’ termination for cause and the  
 16 government’s investigation of his admissions of wrongdoing occurred *before* the Special Committee  
 17 investigation even began. Howrey’s impressions or thoughts as may have been memorialized in the  
 18 interview notes are not at issue with respect to the claims brought by the SEC against Defendant  
 19 Roberts. Thus, Roberts cannot demonstrate a compelling need.

20 \_\_\_\_\_  
 21 <sup>6</sup> Notably, in *Reyes*, the defendant was required to demonstrate that the subpoenaed materials were *not*  
 22 available from any other source, in addition to satisfying Federal Rule of Criminal Procedure, Rule 17  
 23 requirements for relevance, specificity and admissibility. See *id.* at 600 (citing *United States v. Eden*,  
 24 659 F.2d 1376, 1381 (9<sup>th</sup> Cir. 1981)). This burden is essentially no different than that imposed in civil  
 discovery under Federal Rule of Civil Procedure, Rule 26. As noted, Roberts cannot possibly establish  
 that the underlying information in the interview notes is unavailable from other sources, namely, from  
 the witnesses themselves or the Source Binders.

25 <sup>7</sup> Indeed, Howrey’s interview notes constitute hearsay and are thus inadmissible in and of themselves.  
 26 Even the *Reyes* court recognized this basic impediment to ordering production of attorney interview  
 27 notes for impeachment purposes. See 239 F.R.D. at \*15-16 (“The first set of materials — that is,  
 ‘summaries, notes and memoranda related to the interview of Brocade employees’ — includes only  
 hearsay. . . . Simply put, Reyes has proffered no persuasive reason why the written records generated  
 by MoFo or WSG&R would be admissible in and of themselves.”).

1 Nor does Defendant Roberts' unbridled speculation that the interview notes may contain  
 2 impeachment material provide the need that he must establish to obtain production. Even in criminal  
 3 cases where the Sixth Amendment right of confrontation applies, courts have denied requests to use  
 4 attorney-client privileged material for impeachment purposes where there are alternative means to  
 5 impeach a witness's credibility. *See, e.g., United States ex rel. Blackwell v. Franzen*, 688 F.2d 496,  
 6 502 (7<sup>th</sup> Cir. 1982) (attorney-client privileged communications properly held unavailable for  
 7 impeachment purposes where defendant had ample opportunity through other non-privileged material  
 8 to impeach the witness's credibility). As described above, Roberts has all of the civil discovery tools  
 9 available to him to obtain potential impeachment evidence. Roberts therefore has failed to  
 10 demonstrate a compelling need for Howrey's interview notes on that basis.

11 **E. Roberts Is Not Entitled to Howrey's Notes of Communications With McAfee's**  
 12 **Board of Directors Because Those Notes Contain Privileged Communications.**

13 The Court should deny Roberts' request that Howrey produce notes of communications with  
 14 McAfee's Board because those notes are protected by the attorney-client privilege, and there has been  
 15 no waiver. In *In Re BCE West, L.P.*, a corporation's board of directors established a special committee  
 16 comprised of two independent directors to investigate the possibility of certain corporate acquisitions.  
 17 *See* No. M-8-85, 2000 WL 1239117 (S.D.N.Y. Aug. 31, 2000). The special committee was authorized  
 18 to retain its own counsel and did so. Throughout the course of the investigation, the special  
 19 committee's lawyers had communications with the board of directors, which was represented by its  
 20 own outside counsel. In granting a motion to quash a subpoena seeking those communications, the  
 21 court held that communications between the special committee's attorneys and the board of directors  
 22 "were part of the transaction process and did not destroy or waive the Special Committee's attorney-  
 23 client privilege. That privilege remained intact." *Id.* at \*2.

24 The Court should apply the same reasoning here. McAfee's Board charged the Special  
 25 Committee with the broad mission of investigating potential stock option backdating and  
 26 recommending any necessary remedial measures. The Special Committee was created by the Board,  
 27 and it was intended that the Special Committee would report as necessary to the Board.

1 Communications between the Special Committee's attorneys and the Company's Board were a  
2 necessary part of the investigation as a whole. Care was taken to ensure that no third parties were  
3 present at any Board meeting at which the Special Committee reported to the Board and that the  
4 Company's former CEO and Chairman was excused from any meeting at which his conduct was  
5 discussed. Other directors were excused at appropriate times when options grants relating to them  
6 were discussed. Given these facts, there is no basis for concluding that the attorney-client privilege  
7 was waived by communications between the Special Committee and the Board. Accordingly, Roberts'  
8 request for production of Howrey's notes containing such communications should be denied.

9 **F. Roberts Is Not Entitled to the Opinion Work Product Contained in Howrey's**  
10 **Notes of Communications With the Government.**

11 One of the categories of documents Roberts has requested is Howrey's notes of meetings and  
12 telephone conversations with the government. Howrey has offered to produce those notes, provided  
13 only that the limited portions of the notes reflecting attorneys' mental impressions are redacted.  
14 Roberts has rejected this offer, contending he is entitled to all of the notes. *See Gooding Decl.*, ¶ 14.  
15 As noted above in Section IV.D, because opinion work product is afforded near absolute protection,  
16 there is no good faith basis for Roberts' insistence that Howrey produce the notes of its  
17 communications with the government in their entirety. *See Kintera*, 219 F.R.D. at 507.

18 **V. CONCLUSION**

19 Defendant Roberts' extraordinarily broad request for Howrey's privileged interview notes  
20 should be denied because there has been no waiver of the attorney-client or work product privileges.  
21 The interview notes and notes taken during meetings with McAfee's Board contain privileged  
22 communications and mental impressions, conclusions, opinions and legal theories, and have not been  
23 provided to third parties. Moreover, Roberts has received all relevant source materials and is free to  
24 interview or depose all of the witnesses interviewed by Howrey in the course of the internal  
25 investigation. Thus, to order production of the notes, where there has been no waiver of the attorney-  
26 client and/or work product privileges and a total failure on Roberts' part to meet his burden of need,  
27 would be wholly unfounded and unjustified under applicable law. Finally, Roberts is overreaching in  
28

1 seeking those limited portions of notes taken during communications with the government that contain  
2 attorneys' mental impressions. Howrey respectfully urges this Court to deny Roberts's request that  
3 Howrey produce all of its attorney notes in response to the subpoena.

4  
5 Dated: February 15, 2008

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6  
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